No. 2365

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, master of the Norwegian steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, claimant of the American steamship "Beaver",

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Counsel for the Selja in their briefs admit that after the Beaver came within the statutory danger zone as indicated by hearing her approaching one blast fog signal, the Selja failed to obey the specific mandate of Article Sixteen no less than nine times, by failing to stop her engines on any of the first nine whistles from the Beaver. They also admit that if the specific mandate of the statute had been followed

there would have been no collision.* But they urge that the Selja may be freed from the liability for the collision to which her violation of the rule contributed as a *causa sine qua non,* unless claimant further shows it was the proximate cause.

In other words they contend that the same rule of causation applies whether the Selja's captain was subject to the mandate of the statute to do a specific thing, which mandate he disobeyed, or was given a discretion as to what he should do either by statute or the general maritime law. As no clearer case could be imagined for the application of the "but for" or *sine qua non* rule for vessels manoeuvering in a fog, to win their appeal the Selja's counsel must show that this rule no longer applies to collisions in a fog. In further support of this they claim that by virtue of a statute it no longer exists in England.

They still attempt to maintain in their last brief, as a sort of second line of defense, that the *sine qua non* rule applies only when the violation of the statute exists at the moment of collision. They say that although the forces initiated by the violation are not spent when the vessels are *in extremis* nevertheless the fact that it was prior in time excuses it, though it was a *contributing,* if not the proximate cause, of the collision.

They further attempt to distinguish the Admiral Schley upon a most extraordinary error as to the facts,

* In view of counsels' admissions in their briefs, which in fact first appear in their libel, we are unable to understand their irritation at our suggestion that it is not necessary for the court to read the record on this point.

showing in what desperation the wish fathered the thought, or, rather, the fancy.

They still insist that the admitted fault of the Beaver in some way erases or palliates the admitted facts as to the Selja's violation of rule 16. They do this by fallaciously applying the principle, that where the facts are admitted or proved as to one vessel's fault the facts must be clearly proved as to the other's, *to a case where the facts as to their fault in this regard are admitted in their own pleadings and by their own captain.*

They still urge on the court those cases of violation of statutory regulations which the opposing vessel knew of and had the time to avoid, that is, what are known as the "last fair chance" decisions, as overruling *The Pennsylvania sine qua non* rule where the opposing vessel knew nothing of the other's faults and hence could not avoid them.

We give brief further consideration to these arguments and also show the weakness of their attempt to break down our case under rule 15.

I.

The Umbria decision does not affect The Pennsylvania rule as restated less than three years before in The Martello v. The Willey. The law controlling the Umbria-Iberia collision, unlike that in The Pennsylvania and the case at bar, did not impose any specific duty on the captain of the Iberia, but left it to his discretion, whether he would slacken his speed or stop or reverse.

Our opponent admits that there is a difference between the old rule, 18, controlling in the case of *The Umbria,* and the new rule 16, controlling the navigation of the Selja, and then fallaciously proceeds to argue as if the difference did not exist.

Under the old rule it is provided:

> 18. "A steamship approaching another so as to involve risk of collision shall slacken her speed or stop and reverse, if necessary."

That is to say, if a captain, steaming in a fog, hears a whistle forward of his beam, he must determine whether the necessities require one of three things, slowing, stopping his engine, or reversing. He has a discretion and must make a judgment involving several considerations, the density of the fog, the condition of the sea and the wind, the speed of his own vessel, the usual course of opposing vessels, and various other things. Manifestly the propriety of his conduct, of his exercise of this discretion, must be determined by considering the evidence he had before him as he stood on the bridge, not by looking backward after the event,

and declaring fault from a result based on factors of which he had no knowledge. The law compels him to exercise the discretion and he cannot be blamed if, after he properly exercises it in view of what he knew on the bridge, the event is unfortunate. As in any other case where a discretion is allowed, there must be fault in its exercise, and the fault must be the proximate cause of the collision, before his ship becomes liable.

We therefore find the Supreme Court saying, in the case of *The Umbria,* where the captain had exercised this discretion and had not stopped:

> "It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was, she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test. The propriety of certain manoeuvers cannot be determined by the chance that the two vessels may, or may not, reach the point of intersection at the same time, but by the question whether their speed can be stopped before their arrival at the point where their courses intersect. If two steamers are approaching each other in a fog, manifestly their manoeuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no manoeuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible."
>
> *Umbria,* 166 U. S. 412 at 420.

Of course the "propriety of the Iberia's movements" judging the captain's exercise of his discretion as he looked forward from his bridge, "cannot be determined by the chance that the two vessels may or may not reach the point of intersection" as this would clearly not determine whether his movement was either a fault or, if a fault, whether it was the proximate cause of the injury.

In the case at bar, however, the statute prescribes the exact duty. The vessel's engines must be stopped as soon as the whistle is heard forward of the beam. The captain has no discretion and there can be no question as to whether he is in fault. The failure to obey the specific mandate of the statute is itself the fault and this was confessed in the Selja's libel.

Now when such a specific mandate of the statute is violated, the case clearly falls under *The Pennsylvania* rule, as interpreted in *The Martello v. The Willey,* 153 U. S. 64, decided by the Supreme Court less than three years before *The Umbria.* In that case the Willey, a ship, violated the specific statutory requirement that she should blow a mechanical horn in the fog. Instead she blew an ordinary tin horn. After citing *The Pennsylvania* case, it quotes the following from one of the leading English authorities as being identical in effect with *The Pennsylvania* case:

> "To the same effect are * * * The Fanny M. Carvill, L. R., 13 App. Cas. 455, in which the Court of Appeals observed that 'if you can show that there is a defect in the lights, that vessel must be held to blame, unless she can show that the defect which exists in her lights could not by any possibility

> have contributed to the collision.' See also The Duke of Buccleugh, 15 Prob. Div. 86 (1891) App. Cas. 310."
>
> *The Martello v. Willey,* 153 U. S. 64, at 74-75.

Having thus identified *The Pennsylvania* case with the British law, the court goes on to restate the rule with reference to the facts before it, as follows:

> "Can it be said in this case that the absence of a mechanical fog horn could not by any possibility have contributed to the collision?"
>
> *Id.,* p. 75.

Mr. Justice Brown wrote both *The Martello v. Willey* and *The Umbria* opinions. Although he cites *The Martello* in *The Umbria,* on the question of reasonable speed in the fog, he does not mention *The Pennsylvania* rule of liability he had so elaborately considered and stated in that case within three years previously. And yet our opponent insists that by *The Umbria* decision the Supreme Court abolished *The Pennsylvania* rule, and that now in each case the question to be asked by the court is whether the violation of the specific statutory mandate was the proximate cause of the collision. The contention that Justice Brown either consciously or unconsciously reversed *The Martello,* is to accuse the most brilliant admiralty judge in the recent history of the American bench of either mental incompetency or intellectual dishonesty.

It must be obvious that the remarks quoted from *The Umbria* apply only to those manoeuvers which are not ordered by the statute and that as to those speci-

fically prescribed Judge Brown's statement of the rule in *The Martello* still controls.*

If then, the question is not one of *causa proxima* but merely of a *causa sine qua non,* that is, whether the violater of the specific mandate can show that his violation *"could not by any possibility have contributed to the collision"* the question of the offender's reaching the point of intersection of the two courses becomes of vital importance. If the admitted violation of the rule brought him to the point of intersection when he would not have reached it otherwise, it was a *causa sine qua non* of the collision, and the question of proximate causation becomes immaterial.

Now this is exactly the method in which the court applied *The Pennsylvania* rule in *The Admiral Schley, The Georgic* and the English rule in *The Britannia* (see appellee's opening brief, pp. 10-20).

The Britannia, as we have pointed out, uses the very language of Judge Brown in *The Martello v. Willey,* supra, viz.:

> "But the rules have been dealt with over and over again and before one can acquit them of the blame one must see that the non-stopping could by no possibility have contributed to the collision. In this case, if the Britannia had stopped her engines in the first instance, her progress would have been stopped and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows."
>
> *The Britannia,* 10 Asp. Maritime Cases 65, at 68.

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* As the case of Prince v. Eastern Steamship Company, 100 Me. 395, 84 Atl. 894, subsequently cited by our opponents, does not even mention The Martello v. The Willey, its consideration of the "but for" theory need not receive our consideration.

It is therefore submitted that unless the court would overrule the law as laid down by Judge Brown in *The Martello v. Willey,* and in these subsequent cases, Judge Bean's decree must be sustained. Certainly nothing in *The Umbria* will justify such a course.

Captain Lie operated under old rule 18. Instead of stopping his engines at once, he first kept his speed and then slowed, then stopped and then reversed. To hold his action proper and free him from liability for the dangerous position into which he steamed in violation of new rule 16, is virtually to repeal that rule. It is to say that despite the specific mandate you may still exercise your discretion, and if it is a discretion which you could have properly exercised under the repealed rule, you shall not be liable despite the fact that if you had obeyed the new law the collision would not have occurred.

Such a holding would at once break down all mandatory force of the rules of the road. Every violation of the passing signals would then be open to the question, was it not a proper exercise of discretion? It would bring confusion to the mind of every navigator, who must then control his own vessel, not on the theory that the opposing vessel must obey the rules, but with all the uncertainty of anticipation of a claim by his opponent, that he had a discretionary right to do anything that seemed, from his bridge, to be good navigation!

II.

The English Amendment of 1911 of the "but for" rule.

We are unable to follow counsel's argument regarding the repeal in 1911, by act of Parliament, of the *sine qua non* rule as to violations of a specific statutory mandate, even granting that the English courts will treat the repeal as entirely abolishing the presumption, which we doubt. His theory seems to be that because the *sine qua non* rule in Great Britain rested on statute and was repealed by statute, the British repealing act *ipso facto* set aside the general admiralty law of the United States as embodied finally in *The Martello v. Willey.* We do not admit such a wide jurisdiction of the British legislature.

Because the effect of the repeal in Great Britain makes "any enquiry as to whether a breach of a regulation *might possibly* have contributed to a collision henceforth irrelevant", is no reason to disregard the Supreme Court's rule in *The Martello v. Willey,* which requires that on violating the specific command of the statute it must be shown that the "violation could not by any possibility have contributed to the collision".

The deeper fallacy of counsel's argument becomes apparent when we consider the fact that the Pennsylvania-Troop collision occurred in June, 1869, several years before the English statute was passed, when, in the absence of statute, the British rule was the same as that laid down in *The Pennsylvania.*

> "In this case [The Pennsylvania] a barque was condemned for ringing a bell as a fog signal while

under way, although in a case arising out of the same collision the Judicial Committee of the Privy Council held that, inasmuch as it appeared that the fog horn would not have been heard a sufficient distance to have enabled the steamer to avoid the danger, the barque should not be condemned for a technical failure to comply with the statute. 3 Mar. L. Cas. 477, 23 L. T. 55. *In other words, both courts proceeded upon the same legal principle;* but in the English court the evidence was considered sufficient to show that the sounding of a bell instead of a fog horn could not have contributed to the collision."

The Martello v. Willey, 153 U. S. 64, at 74;

The Pennsylvania, 22 L. Ed. 151, 19 Wall. 125.

Surely *The Pennsylvania* rule, if it agreed with the British law prior to the statute, is not to be deemed set aside simply because a subsequent statute has been repealed. In giving the history of the rule in America, Judge Brown, in *The Martello,* does not mention the British statute. Nor does he treat the American rule as resting on the British admiralty law. He simply points out the identity of the two in the absence of statute.

III.

The Congressional Act itself fixes the danger zone within which rule 16 is mandatory. It is a matter of indifference whether the Selja was moving ahead or astern, it appearing that her length was across the course of the Beaver, and that she would have been several thousand feet away if she had stopped her engines on hearing even the fifth of the Beaver's whistles.

There are limits, of course, to which the *sine qua non* rule cannot be carried. If a violation of the rule as to the blowing of a single blast fog signal had occurred half an hour before the collision, when the whistles could not have been heard by the opposing steamer, it is of course manifest that the violation did not contribute.

No better illustration of the boundary of the doctrine could be found, than the motor car case, *Berry v. Sugar Notch Borough,* 191 Pa. State 345, 43 Atlantic 240, cited in our opponent's last brief. In that case the motor was proceeding in excess of the rate of speed permitted by the ordinance and it brought the car under a certain tree at the very moment the wind blew it down. Here of course there was no statutory relationship between the speed of the motor car and the falling of the tree. It was not a case of running into a tree already down. The city legislators were not making a law to avoid trees falling from above. Whereas in the case at bar the rule applies only *when the captain becomes conscious of the fact that there is a*

vessel before him by hearing her whistle. The rule is initiated only by the consciousness of the presence of the other vessel and itself sets the boundary of its application.

All that Judge Bean, in the court below, and these other decisions hold is that Congress intended that, once the vessels come close enough to hear the whistles of a neighboring vessel in fog—that is, that they are within the "zone of danger of collision", then *The Pennsylvania* "but for" rule applies when a specific mandate is violated.

Counsel's reiteration that his vessel was going astern across our bows gains him nothing if the rule applied by all these judges applies here. The Selja's struggles *in extremis* to go astern, did not in fact take her away from the Beaver's course. She was still there and there only because of an act which violated the statute.

Even if we apply the ordinary rule of causation where there is no specific statutory mandate, it is immaterial whether the vessel is going ahead or astern at the moment of impact. She may very well have put on her full power ahead to escape at the last moment—a manoeuver which the courts have always excused. Whichever rule of causation we apply, the slow movement of the Selja, one way or the other, becomes immaterial so far as the violation of Article 16 is concerned.

Counsel still urge that unless the violation of the statutory mandate occur at the moment of impact, *The Pennsylvania* rule does not apply. They ignore

the words of that decision itself, defining what the "time of the collision" and "contributing to the collision" mean. Both of these phrases occur in the same paragraph of the opinion, which further defines them as covering a fault "which in *any degree* was the cause of the vessels coming into a dangerous position".

The Pennsylvania, 19 Wall. 136.

Here is no question of proximate causation but mere contribution, through acts some time previous which initiated forces which bring about the "dangerous position".

In the case of the *Hawgood Co. v. Mesaba SS. Co.,* 166 Fed. 697, the Circuit Court of Appeals for the Sixth Circuit applied the rule to a violation of statute concerning signals occurring when the vessels were a mile apart, holding that this was within the "time of the collision".

> "But it is urged on the part of each vessel that the violations of the rules of navigation so appearing on her part could not have contributed to the collision. The fact that a ship was at the time of collision in actual violation of a statutory rule designed to prevent collisions throws the burden upon her to show that such violation could not have contributed to the collision. The Pennsylvania, 19 Wall. 125, 126, 22 L. Ed. 148; The Martello, 153 U. S. 64, 74, 14 Sup. Ct. 723, 38 L. Ed. 637; The Ellis, 152 Fed. 981, 82 C. C. A. 112. Not only can it not be said in the case of either of these vessels that *but for* her violation of the rules the collision would have occurred solely on account of the fault of the other vessel, but it would seem reasonably probable that, had either vessel observed the duties

which we find to have been violated, the collision would not have occurred."

Hawgood Transit Co. v. Mesaba SS. Co., (C. C. A.) 166 Fed. 697, at 702.

Our opponents have also made no answer to our point that the violation of the passing signal regulation brings the offender under the *Pennsylvania* rule and yet the passing signals must be given long before the collision. There are no passing signals for vessels *in extremis.* Nor have they answered the suggestion that under their construction, the *Pennsylvania* rule would not apply to a vessel lying at sea with no way on her, and blowing no two blast signals as required by rule 15, till the approaching vessel was within a minute off and then blowing two blasts and another two blasts at the moment of impact. She would not be in violation of the rule, under their construction, because obeying it *at the time of the collision.* Could any result be more absurd?

It is not astonishing that the reply brief while reiterating their proposition, does not attempt to answer these examples showing its unreasonableness.

IV.

Counsel's extraordinary error as to The Admiral Schley.

The final decision of *The Admiral Schley,* 142 Fed. 64, at 67, by the Circuit Court of Appeals of the First Circuit, is, we think, conclusive authority for our contention. Counsel recognize its force and strain every effort to distinguish it. That this can be done only by a complete misunderstanding of the facts is significant of its real impregnability.

In that case, as with the Selja, the Admiral Schley failed to stop her engines "when she heard the *first faint* whistle from the Meyer". The court applied *The Pennsylvania* rule, saying, "except for" the violation of rule 16 "there would have been no occasion for the litigation".

Counsel comment on this as follows:

> "The case at bar is entirely different from that of the Schley with her 2000 foot tow" * * * "that was a case of a vessel with a tow over 2000 feet long loitering in the path of navigation and constituting an obstruction thereto", etc.

Now the fact is that the Schley was steaming without a tow. It was her failure to stop her engines that placed her across the bows of the tug Meyer who had the 2000 foot tow. It was the Schley, like the Selja, whose violation of the statute "was in some degree the cause of the vessels coming into that dangerous position".

Counsel's position with reference to *The Schley* case is the harder to understand in view of the fact that both vessels were held in fault for violation of rule 16 under the reasoning of *The Pennsylvania* case, 142 Fed. 67. We can find nothing in the facts to support the idea that both vessels had long tows and hence that the decision cannot be held to have passed squarely on rule 16.

As we have pointed out, the portion of *The Pennsylvania* decision on which the Circuit Court of Appeals then relies, is that applying the "but for" rule to a violation of the specific mandate of the statute which "in any degree is the cause of the vessels coming into a dangerous position" (19 Wall. 136).

It was the coming into the dangerous position before the bows of the Meyer, not the fact that the Schley was going ahead or astern when they came together, that was the cause of the collision. So also with the Selja lying nearly at right angles across the bows of the Beaver at the moment of impact. The analogy is complete, and the decision as to liability should be the same.

V.

The opinion in The Belgian King nowhere considers the portion of rule 16 involved in this case—that is, requiring stopping the engines. It holds that the passing rules and not the stop engine rule applied to the Tellus. The two rules are mutually exclusive. As the former was applied the latter could not have been considered.

Our opponent's final brief takes no notice of the contention concerning *The Belgian King,* 125 Fed. 869, 876, brought out at the hearing of the appeal, a contention which conclusively disposes of that case as an authority in the case at bar. On the contrary, they draw an inference from the reporter's headnotes not in the slightest way warranted by the opinion.

The fact is that the second half of rule 16, that is the stop engine part, is nowhere considered in the opinion.

After stating the facts the Court of Appeals, on page 875, sets forth the rules it believes involved in the case. They are rule 16, controlling in fogs, and rule 18, of the steering and sailing rules. In the next paragraph, ending on page 876, the court considers the first half of rule 16, requiring moderate speed, and finds The Belgian King violated it.

In the next paragraph, page 876, the court *excludes the consideration of the stop engine portion of rule 16* by finding that the positions of the vessels were so ascertainable that the *passing rules,* and particularly

rule 18, came into effect. The language of Judge Morrow is as follows:

> "The next inquiry relates to the interpretation of signals given by the respective steamers, and the manoeuvers of the vessels upon those signals. When the whistle of the Belgian King was first heard, the position was sufficiently ascertainable by the Tellus to permit her to continue on her course at slow speed, *and give the direction signal that she was going to starboard.* Not receiving a *proper response to that signal,* the engines were stopped and the signal repeated, the ship drifting for some minutes before the collision."
>
> *The Belgian King,* 125 Fed. 869 at 876.

The Tellus' right to apply *passing* rule 18 is necessarily exclusive of the obligation to stop engines under rule 16. One cannot be at once exchanging signals for passing and stopping his engines for not passing. The two rules are mutually exclusive.

While we believe that Judge Morrow erred in holding that the Tellus was entitled to attempt to pass the other vessel when she was out of sight in the fog, the undeniable fact is that he did so hold and that his opinion is valueless as an interpretation of the stop engine rule.

Surely such a case cannot be authority here where the nine failures after three o'clock to obey the stop engine rule in the fog cannot in the remotest way be connected with the passing rules.

Not only is the stop engine portion of rule 16 not discussed by Judge Morrow, but *The Pennsylvania* rule is not mentioned. We cannot see how the decision of this

court in *The Belgian King* has the slightest bearing on the case at bar.

The same is true of Judge De Haven's decision in the lower court. The court does not even mention the Tellus' non-stopping—much less consider it with reference to the latter part of rule 16. Its consideration of the non-stopping as applied to *The Belgian King* is entirely in accord with our contention here.

VI.

The rule requiring the fault of one vessel to be clearly made out where the other is admitted or proved, is entirely satisfied as to the Selja's admitted faults.

Counsel cite a number of cases to prove that where one vessel is shown to have violated a statutory mandate, the proof as to the other vessel's fault must be clearly made out. This, of course, is a mere rule of evidence. It has no application to a case like that at bar, where the facts as to the Selja's violation of rule XVI are admitted by the pleadings and her captain. There has not been the slightest doubt that Captain Lie was charged with knowledge of the fact that he was running towards an approaching steamer during the ten minutes in which he failed to obey the stop engine rule, and that his failure might in some degree contribute to the collision. The only question disputed is a question of law, i. e., does liability for violation of the specific mandate to stop engines flow from its admitted *contribution* to bringing the vessels "into a *dangerous* position" or must it be shown to have been the *proximate cause* thereof.

Now in the cases cited by counsel the question is a disputed fact as to whether contributory negligence existed at all. The chief case cited, a Supreme Court decision, so lays down the rule:

> "In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the *evidence* of contributory negligence on the part of the sailing vessel *should be*

> *clear and convincing.* Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to *raise a doubt* with regard to the management of the other vessel. There is some presumption at least adverse to its claim and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."
>
> *Alexandre v. Machan,* (The City of New York) 147 U. S. 72 at 85 (37 L. Ed. 84; 90).

The evidence as to the Selja's failure to follow rule 16 from 3 to 3:10 is as "clear and convincing" as admission of pleading and captain can make it. It is equally clear and convincing that it contributed to bring the vessels into a dangerous position, and that it was a *causa sine qua non* of the collision. This is true beyond a reasonable doubt.

The same rule controls in *The Commonwealth,* 174 Fed. 694, much relied upon by our opponents. The reasoning of the decision there is summed up in the last paragraph of the opinion on page 702:

> "There is considerable legitimate criticism of the Volund's navigation but in view of the gross fault of the Commonwealth in proceeding at such a rate of speed, I do not think, under the authorities, that the Volund's *minor faults are clearly enough established* to entitle the Commonwealth to an apportionment of the damages."
>
> *The Commonwealth,* 174 Fed. 694 at 702.

So with *The Lord O'Neill,* 66 Fed. 77, where there was a dispute both as to whether there was a failure to blow a passing signal and as to its contribution,

not as the proximate cause, but whether it "had or probably might have had something to do with the act which produced the injury".

In *The Europe,* 175 Fed. 596, Judge Wolverton lays down *The Pennsylvania* rule as we contend for it. On appeal this court held as a fact that the fault was "harmless".

And so with all the other cases on this point. In no case, either cited by counsel or that we can find, where the vessels are manoeuvering in a fog and hence where the captain of each vessel must steer his ship solely by sound from the other vessel, has a failure to follow the specific mandate of a statutory rule been excused where it clearly contributed to the collision, even though it was not the proximate cause thereof, and even though the fault of the other vessel was admitted.

On the question of the enormity of the Beaver's offense, even were it pertinent, we feel that our opponent has drawn rather a long bow. Captain Kidston was coming out of a bight (897) and wished to round Point Reyes for his next departure. A steady and accustomed rate would bring him there and enable him to change his course with accuracy, and so he kept his speed when the fog suddenly shut down on him about fifteen minutes before the collision. It was a serious fault but not without a reason, a reason not disconnected with the safety of his ship. They would certainly be safer if he could tell where he was in the fog than if he could not. The certainty was un-

doubtedly purchased at too high a price, but the fault was nowhere near so great as in many cases where vessels with a much higher speed have divided damages with their opponents. As to the other alleged faults, the Beaver stopped immediately on the second whistle from the Selja (Kidston, p. 900) and her previous slight change of half a point did not contribute, as it admittedly took her away from the Selja rather than towards her.

VII.

The "last fair chance" rule an obvious exception to The Pennsylvania rule. Consideration of cases or error in clear daylight which were held not to contribute because the opposing vessel did not avoid them, with full opportunity to do so.

We have not discussed the many cases cited by counsel involving the "last fair chance" rule. This rule provides that where, as in the case of negligently approaching another vessel which is on the wrong side of the channel in broad daylight, the approaching vessel does so with its eyes open and with a free chance to avoid its opponent's fault, it cannot claim that fault as a contribution to the collision.

Such cases are:

Long Island R. v. Killien, 67 Fed. 365;
The Lowell M. Palmer, 142 Fed. 937;
The Albatross, 184 Fed. 363;
Wilhelmosen v. Ludlow, 79 Fed. 979;
The Clara, 55 Fed. 1021;
The E. A. Packer, 20 Fed. 327;
The Maryland, 19 Fed. 551;
The Buckeye, 9 Fed. 666.

In all of them it is held that the fact that the one vessel could manoeuver with freedom and had such full knowledge of his opponent's fault, if any, that it could have avoided its effects, made that fault innocuous. They can have no application to the case of two vessels in a fog where neither the faults nor whereabouts of one vessel are known to the other till both are *in extremis.*

VIII.

Further purpose of rule 16 is to increase the time during which vessels are approaching one another in order that each may better make out the location of the other.

What the purpose of Congress was in passing the rule has not been shown, but from its provisions it is apparent that one of the great advantages to be gained, is in lengthening the time during which the vessels are approaching. The uncertainty regarding the hearing of fog signals makes it important that as many of these as possible should be heard by the opposing steamer to assist her in locating her opponent.

In the case at bar but two fog signals were heard by the Beaver from the Selja, one just before the vessels came in sight, and hence the first when they were scarcely a minute from *in extremis*.

Can it be said beyond any possibility that, had the Selja obeyed the law and stopped her engines some ten minutes before she did, more of her greater number of whistles due to her greater time in approaching, would not have been heard by the Beaver and the collision avoided? What would have happened had the Beaver heard *more* of the Selja's whistles cannot, of course, be determined. Under *The Pennsylvania* rule, the violation of the stopping mandate must, therefore, be deemed to have been a contributing cause even if not the proximate cause of the collision.

The above suggestion is offered in answer to the argument that the only purpose of the stopping rule

is to enable the vessel hearing another approaching, to come to a standstill. The increased number of whistles to her opponent during her slower approach under the stop engine rule is equally valuable as a preventative of collision.

IX.

The Selja's failure to blow two whistles.

Counsel's attempts to meet our case on this point do not, we feel, impair in the slightest the force of the array of facts set forth in our opening brief. They can be followed only by a careful study of the record, but when so studied our point will be seen to be "clearly" established within the rule of the so-called minor and major fault cases. Referring to the lazy man's rule of *The Kentucky,* 148 Fed. 500, namely, that if the court finds the facts involved it will dodge their analysis, we do not think that this will appeal to this tribunal.

There is nothing involved or uncertain in Engineer Eggen's testimony that she would have been stopped in the water two minutes before the collision. Having this testimony from their engineer, who should have known, it surely was not for us to examine any other witness from the Selja on this point. There is nothing uncertain in the statement of the log that she was nearly at a standstill at 3:10.

Nor is there anything uncertain in Mr. Bulger's testimony. He is an unprejudiced witness. He says that Captain Lie told him they were at a standstill for some time. With such statements from captain and chief engineer and log, the court cannot ignore the many overwhelming corroborating incidents cited in our brief. If the situation is an involved one (and this is a relative term, for all collision cases are that) the complexity is in the fabric of the case itself, which

must be constructed largely from our opponents' witnesses.

Our opponents' method of attack is fairly illustrated by the following few examples: For instance, some of the Beaver's officers place her speed at 15 knots for 77 revolutions under sea conditions. The experts say that she would have a theoretical speed of 15.27. Our officers' testimony is questioned because they omitted the fraction.

Other differences of opinion of the officers as to speed are mentioned but without pointing out the difference between full speed at a trial trip and the variable rates which come within the range of full speed as indicated by the telegraph. The different opinions were based on these different conditions.

Ignoring the fact that the location of the point of collision is exactly fixed by the bearings from Pt. Reyes taken after the fog raised, counsel make much of difference of opinion as to the amount the swell cut down the Beaver's speed. Nothing could have been more suspicious than an agreement on this point. The significant thing is that they agree that it will cut the Beaver's speed down considerably and that she could not have reached the place Lie testified when they collided. Unless the collision was at the point Lie testified to, his whole diagrammatic scheme fails, and with it his contradiction of Mr. Bulger's testimony.

It is interesting that both sides seem entirely satisfied with the character of their witnesses. The Selja's counsel take great comfort in the perfect mosaic of

fact which their officers construct, with its miraculous coincidences, while the Beaver's counsel point with equal confidence to the agreement in substantial matters with the disagreement as to minor detail inevitable where there has been no collusion.

It is submitted that the Selja must be held liable on her pleadings and her captain's admissions for contributing to the collision by violating rule 16; and that on the whole record she should be held liable for violating rule 15 in not blowing two blasts as she lay at a standstill some six miles south of Pt. Reyes Lighthouse.

Respectfully submitted,

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